In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1727

SALVATORE CIOFFI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court erred in admitting in evidence tape recorded conversations between petitioner and a government witness who consented to the recording, that the evidence was insufficient to sustain the charges of obstruction of justice, and that the district court erred in permitting a government witness to testify as to his interpretation of certain recorded conversations to which he was a party.

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to obstruct and obstruction of justice by corruptly endeavoring to influence a witness, in violation of 18 U.S.C. 371 and 1503, respectively. He was sentenced to terms of 18 months' imprisonment on each count, the sentences to run concurrently. The court of appeals affirmed (Pet. App. A, 1a).

Through the testimony of Perry Scheer, corroborated by tape recordings and by the testimony of his uncle, Alex Goldstein, the government proved that petitioner and others tried to prevent Scheer from testifying before a federal grand jury about an extortionate loan transaction perpetrated by an associate of petitioner, Joseph Marando. From June 1970 to October 1971, Perry Scheer was a registered representative with Kelly, Andrews and Bradley (hereinafter "KAB"), an over-the-counter brokerage firm (A. 86a-87a).[1] In October 1970, Scheer was one of three persons associated with KAB who signed a promissory note for a $25,000 loan from Joseph Marando, at an interest rate of 104% a year (A. 115a-116a). Marando collected weekly payments of $500 cash, and when payments were not timely made, Marando threatened physical harm and violence to the borrowers and also threatened that he would send "collectors to our home to take our wives or our furniture, whatever he could get" (A. 116a).[2]

Petitioner's involvement began in March 1972, after the brokerage firm was the subject of multiple governmental investiations (Pet. App. A, 6a-8a). Perry Scheer's uncle, Alex Goldstein, a union-local officer, was contacted by a man who identified himself as Mr. Pinter, who asked to meet with him, which Goldstein agreed to do (T. 37-39).[3] However, instead of Pinter, petitioner and another person appeared at the meeting. Petitioner told Goldstein that his nephew Perry Scheer had a problem and asked Goldstein to arrange a meeting between petitioner and Scheer (T. 40-42).

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[1]"A." refers to the Appendix in the court of appeals.

[2]On May 18, 1972, an indictment was filed charging that Marando's $25,000 loan was an extortionate extension of credit and that on dates specified in the indictment Marando had illegally used threats of violence to collect payments from Scheer and others (Government Exhibit 4).

[3]"T." refers to the transcript of the trial.

Petitioner then met with Perry Scheer on March 30, 1972. Petitioner told Scheer that he had met with Marando, that he had heard about KAB's difficulties, and that he understood about Scheer's situation with his wife (Scheer's wife was totally disabled and bedriden with cancer. (A. 114a). Petitioner told Scheer to forget about the balance of the $25,000 loan and the interest due on it. Finally, petitioner said he wanted to check back with Marando, and that he might contact Scheer again (A. 110a-113a).

In early April 1972, Goldstein again arranged for petitioner to meet with Scheer (T. 46). At this meeting petitioner said he was aware of the grand jury investigation of KAB and offered to let Scheer read notes that petitioner said showed "what people who were brought before the grand jury had said." Scheer refused the offer (A. 118a). Petitioner then told Scheer that if the grand jury asked him about the $25,000 loan he should say that the loan was to a Mr. Bassani as well as himself and that Marando was collecting from Bassani, not him. Petitioner asked Scheer to accompany him to Brooklyn to see Marando who would "fortify" him and "make him strong" so he knew what was happening and "could communicate it as such". Scheer did not go to see Marando because he was afraid. A few weeks later Scheer informed the government about the meetings with petitioner (A. 118a-120a).

After Scheer testified before the grand jury for a second time on April 27, 1972 (A. 120a), petitioner arranged with Goldstein to meet Scheer again, on May 18, 1972. Prior to this meeting the FBI, with Scheer's approval, placed recording equipment on him (A. 121a).[4]

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[4]In addition to the May 18, 1972, meeting with petitioner, conversations were recorded on May 25, 1972, May 31, 1972, and June 1, 1972. These tape recordings were received in evidence at trial (Government Exhibits 6, 7, 8, and 9).

Scheer testified as to what took place at the meeting (A. 122a-123a):

> Mr. Cioffi asked me if my wife could take a ride to Brooklyn. I said she could not. He asked me if she was being attended to at home and was she accounted for and I said she was, she could not move and she could not go anywhere. He told me it was important for me to go to Brooklyn, to sit down with Joe [Marando] who would help me. He would direct me. He would fortify me and make me strong. He would tell me what to tell a lawyer that he would hire for me and pay for me before I testified in the grand jury. He told me that Joe was on top of everything and talking to everyone and that it would help me to know what is happening and Joe can tell me since he is discussing everything with everyone involved. I asked him, Mr. Cioffi, that is, if he was discussing it with Mr. Schiffman and Mr. Cioffi said Mr. Schiffman will do everything or anything you tell him and he already took the fifth, get my point, meaning I should take the fifth if called and the government would * * * not have a case.

Petitioner also told Scheer, " * * * you gonna tell just what he [Marando] tells you because it's gonna be secured from other parties" (Government Exhibit 6-A, p. 31).

On the same day, May 18, 1972, as noted above, the indictment was returned by the grand jury charging Marando with extortionate extension of credit and charging that on dates specified in the indictment Marando had illegally used threats of violence to collect payments from Scheer (Government Exhibit 4).

In late July or early August 1972, petitioner visited Goldstein and asked him if he would get Scheer to put

in writing that he was never threatened or intimidated on the dates specified in the Marando indictment, a copy of which petitioner had with him (Pet. App. A, 10a-11a).

The defense presented no evidence.

1. Petitioner contends that the district court erred in admitting the tape recorded conversations between petititioner and Scheer. Petitioner did not object to the admission of these recordings at trial (T. 487) and did not raise this issue in the court of appeals.[5] Therefore, petitioner should not be permitted to raise the issue before this Court. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147, n. 2; *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16. In any event, this contention is without merit.

The contention is bottomed on the mistaken notion that, absent petitioner's consent to the recordings, a court order was required. However, Perry Scheer's consent to the recordings of his conversations with petitioner is undisputed. Where an individual consents to the recording by government agents of his conversations with another, the agents do not need to secure a warrant prior to the recording. *United States* v. *White*, 401 U.S. 745; *Hoffa* v. *United States*, 385 U.S. 293; *United States* v. *Marrapese*, 486 F. 2d 918, 921 (C.A. 2), certiorari denied, March 25, 1974, No. 73-916.[6].

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[5]Petitioner did object at trial and in the court of appeals to Scheer's interpreting the tapes and did object in the court of appeals to the submission of transcripts of the recordings to the jury (Br. 34). The latter issue is not raised in the petition.

[6]Warrantless tape recording by government agents of conversations pursuant to the consent of a party to the conversations is not a violation of Title III, Omnibus Crime Control and Safe Streets Act of 1968. 18 U.S.C. 2511(2)(c).

2. Petitioner also contends that the evidence was insufficient to prove that he endeavored to obstruct justice. The evidence, however, as set forth above, clearly showed that petitioner endeavored to have Scheer take the Fifth Amendment or lie to the grand jury. As the court of appeals stated (Pet. App. A, 14a):

> The whole tenor of the various phases of the messages from Marando, as delivered by Cioffi, was that he had better do what he was told, or else.

Petitioner endeavored to have Scheer either give false testimony or take the Fifth Amendment before the grand jury. However, assuming *arguendo* that petitioner's efforts were solely directed toward having Scheer plead the Fifth Amendment, this would be sufficient to sustain his conviction under 18 U.S.C. 1503, because petitioner's efforts were made corruptly. *Cole* v. *United States,* 329 F. 2d 437, 443 (C.A. 9), certiorari denied, 377 U.S. 954; Pet. App. A, 14a.[7]

3. Petitioner cites no authority to support his contention that the trial court committed reversible error in permitting Perry Scheer to testify as to his interpretation of certain language used by petitioner in the tape recorded conversations with him. It is well settled that "[a] witness may

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[7]Contrary to petitioner's assertion (Pet. 24) no conflict exists in the circuits regarding this issue. The Ninth Circuit is in agreement with the Second Circuit that it is a violation of 18 U.S.C. 1503 corruptly to advise a witness to take the Fifth Amendment. *Cole* v. *United States, supra,* 329 F. 2d at 443. The Sixth Circuit only held that it is not obstruction of justice to submit a false affidavit in connection with a motion for a new trial. *United States* v. *Essex,* 407 F. 2d 214, 217. The district court in the Western District of Pennsylvania held that the FBI is not engaged in the administration of justice within the terms of 18 U.S.C. 1530. *United States* v. *Scoratow,* 137 F. Supp. 620.

* * * testify as to what he understood to be the true meaning of the words used by another." *James Bakalis & Nickie Bakalis, Inc.* v. *Simonson*, 434 F. 2d 515, 518, n. 5 (C.A. D.C.); *Wiley* v. *United States*, 257 F. 2d 900, 908 (C.A. 8).

4. In the Questions Presented (Pet. 3), petitioner contends that his cross-examination of Scheer was improperly limited by the district court. This contention is not argued in the petition, and is without merit.

On direct examination Scheer admitted that he had made illegal cash payments to induce brokers to sell securities to their customers in connection with seven underwritings (A. 159a). Petitioner was permitted to cross-examine Scheer about his motives for testifying, particularly about his participation in these illegal activities and the immunity he received with regard to them (A. 241a-245a, 268a-269a); however, petitioner was not permitted to cross-examine as to the underlying details of these violations (A. 192a). Having allowed Scheer's illegal activities and his immunity to be shown, the district court acted well within its discretion in limiting further cross-examination with respect to these underlying details. *United States* v. *Miles*, 480 F. 2d 1215, 1217 (C.A. 1); *United States* v. *Kahn*, 472 F. 2d 272, 280-281 (C.A. 2), certiorari denied, 411 U.S. 982.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.